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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH B. SAWATZKY,

Petitioner,

—v.—

CITY OF OKLAHOMA CITY,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether the First Amendment permits the state to criminalize all solicitations of private, non-commercial sexual activity between unmarried and consenting adults based on an asserted interest in protecting listeners from speech that the state has deemed "not appropriate in public places"?

2. Whether the court below erred, as a matter of First Amendment law, by proceeding on the assumption that petitioner could validly be convicted for solicitation even if the underlying conduct he solicited was entitled to protection under either the state or federal constitutions?

PARTIES TO THE PROCEEDING BELOW

The caption of the case includes the names of all parties.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of the State of Oklahoma is reported at 906 P.2d 785 (Okla. Crim. App. 1995), and is reprinted in the appendix. (App. 1a). There is no written opinion associated with petitioner's conviction and sentencing in the Oklahoma City Municipal Court, nor is there a written opinion reflecting that court's denial of petitioner's motion to dismiss. The trial court's one-sentence oral ruling denying the motion to dismiss is unreported.

JURISDICTION

The Court of Criminal Appeals of the State of Oklahoma, the state court of last resort in criminal cases, issued its decision on November 21, 1995. That decision affirmed petitioner's conviction and sentence in municipal court for "Offering to Engage in An Act of Lewdness."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 30-152(a) of the Oklahoma City Municipal Code provides:

> No person shall engage in or offer to engage in any act of prostitution or other act of lewdness or to solicit, induce, entice, or procure another to commit or engage in any act of prostitution or other act of lewdness.

As used therein, "lewdness" means:

a. any lascivious, lustful or licentious conduct,

b. the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse, or

c. any act in furtherance of such conduct or any appointment or engagement for prostitution[.]

Oklahoma City Municipal Code §30-151(1).

STATEMENT OF THE CASE

Factual Background

On July 6, 1994, petitioner Kenneth B. Sawatzky visited an area known as Hobie Point, a peninsula of land that reaches into Lake Hefner in Oklahoma City. This public park includes a beach and paths through wooded groves, and is designed for the public's enjoyment of the out-of-doors. (Nov. 14., 1994, Trial Transcript ("Tr. Trans.") 97-100).

While walking down a secluded dirt roadway, *id.* at 106, Mr. Sawatzky encountered a man later identified as Officer Raymond A. Ledford of the Oklahoma City Police Department, who was on undercover duty. Officer Ledford, dressed in jeans and a tank top, was leaning against a parked car and smoking a cigarette. *Id.* at 104, 107. Mr. Sawatzky asked Officer Ledford for a cigarette and the two men struck up a conversation. *Id.* at 107-08.

Officer Ledford pretended to be a construction foreman visiting from Kansas City. He told Mr. Sawatzky that he

was staying at the Holiday Inn on 39th Street. *Id.* at 110. He also told Mr. Sawatzky that he had heard of Hobie Point at a bar near "39th and Penn," a predominantly gay area of Oklahoma City. *Id.* at 108, 115. Officer Ledford asked Mr. Sawatzky if he was a police officer and appeared to be nervous about a potential police presence at Hobie Point. *Id.* at 108-09. All of Officer Ledford's remarks were designed to put Mr. Sawatzky at ease and to indicate receptivity to a "homosexual proposal." *Id.* at 115-28.

Mr. Sawatzky eventually asked whether he could go to the other man's hotel room to take a shower; he received an affirmative reply. *Id.* at 111. The two men then walked to Mr. Sawatzky's car. At the car, the officer asked Mr. Sawatzky "what he liked." *Id.* at 113. Mr. Sawatzky did not reply with any specifics when first asked this question, but on a second asking said: "I want to suck a dick." *Id.* at 113, 128. Officer Ledford responded that "I had a dick for him" and reached into his pocket to pull out his badge. *Id.* at 114-15. Mr. Sawatzky was arrested and charged with "offering to engage in an act of lewdness," as prohibited by Oklahoma City Municipal Code Sections 30-152 and 30-151.

Proceedings In The Oklahoma Courts

1. On July 27, 1994, Mr. Sawatzky moved to dismiss the charge against him. He argued that his conversation could not be punished unless it constituted an offer or solicitation of an *unlawful* act and that fellatio between two men could not -- under the Oklahoma Constitution's right to privacy, the state and federal constitutional rights to equal protection, and the state and federal prohibitions against establishment of religion -- be made unlawful. (Sept. 1, 1994, Motion Hearing Transcript ("Mot. Trans.") 6-7; Aug. 30, 1994, Defendant's Memorandum In Support Of Motion To

Dismiss 1-2).[1] Mr. Sawatzky's counsel emphasized that "if you may commit these acts in the privacy of your own home or in a motel room as alleged in the information, then you certainly have the constitutional right to ask someone to commit these consensual acts." (Mot. Trans. 7). The city did not dispute that proposition; rather, it argued that the underlying "lewd" acts were validly proscribed. *Id.* at 17-21. The municipal court, ruling without explanation from the bench, denied the motion to dismiss. *Id.* at 23.

2. Mr. Sawatzky was tried before a jury on November 14, 1994. In response to defense motions after the state's case, the municipal court indicated that it "did not desire to revisit" Mr. Sawatzky's constitutional challenges, including his underlying claim of "violation of First Amendment protection . . . of free speech." (Tr. Trans. 126-27). The jury rendered a guilty verdict and recommended punishment of a $250 fine. *Id.* at 176. On December 1, 1994, the court imposed the sentence recommended by the jury.

3. On December 8, 1994, Mr. Sawatzky filed a timely Notice Of Intent To Appeal to the Oklahoma Court of Criminal Appeals. In that court, he renewed his arguments that the state could not constitutionally punish private, consensual, non-commercial sexual acts between two men and that therefore his conviction for "offering" such an act should be overturned. Mr. Sawatzky again invoked the Oklahoma Constitution's right to privacy, the state and federal constitutional rights to equal protection, and the Oklahoma Constitution's prohibition against establishment of religion to contest the government's power to make private

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[1] The Oklahoma Court of Criminal Appeals had earlier held that heterosexuals could not be criminally punished for private, consensual, non-commercial sodomy. *Post v. State*, 715 P.2d 1105, 1109 (Okla.Crim. App.)("the right to privacy . . . includes the right to select consensual adult sexual partners"), *cert. denied*, 479 U.S. 890 (1986).

same-sex sexual acts unlawful. (Appellant's April 28, 1995, brief in Accelerated Docket format).

In response, the government disputed Mr. Sawatzky's reading of prior cases and contested the factual foundation for his equal protection and establishment of religion claims. The government did not, however, offer any affirmative statement of a purportedly valid state interest that it sought to serve in prosecuting Mr. Sawatzky. (Appellee's June 26, 1995, brief in Accelerated Docket format).

The court of criminal appeals refused to address Mr. Sawatzky's constitutional objections to the criminalization of private same-sex sodomy, which he argued would then void his conviction based on a verbal offer to participate in such conduct.[2] The court took the position that,

> [t]his case is neither about the regulation of conduct between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons. Fundamentally, this case is about whether Oklahoma City may legally prohibit *public solicitations* for private non-commercial acts of sodomy.

(App. 1a-2a)(emphasis added).

The court of criminal appeals decided that it need only review Mr. Sawatzky's conviction under a rational basis standard. The court then hypothesized for Oklahoma City a "legitimate governmental interest" in "protect[ing] persons from being asked by others to engage in sexual activity."

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[2] The court of criminal appeals explicitly declined to rule on whether the state constitutional right to privacy protects "private non-commercial sodomy between consenting adults of the same gender" (App. 2a), and on whether homosexuals and heterosexuals, in light of the right to equal protection, must be treated alike for purposes of the criminal punishment of sexual behavior. (App. 3a).

(App. 4a). The court acknowledged that its newly conceived purpose for a public solicitation ban "implicates . . . the First Amendment right to free speech." (App. 4a n.7). It also noted, in a nod to Mr. Sawatzky's arguments, that "it is generally recognized that government should not prohibit the solicitation of conduct that is not unlawful." *Id.* Ultimately, however, the court concluded:

> In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, [are] simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

Id. On this reasoning, the court upheld Mr. Sawatzky's conviction.[3]

Thus, the first federal question on which petitioner seeks review is timely and properly raised here in the first instance, because only with the court of criminal appeals decision was the notion of protecting listeners from "inappro-

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[3] The court below also explained the marital exception to §30-152 by concluding, "We are of the opinion that within the marital relationship the parties to the relationship impliedly consent to sexual solicitations (not sexual acts) and, thus, the City's exception of married persons is entirely reasonable and rationally related to the purposes of the ordinances." (App. 5a n.8).

Judge Strubhar, in dissent, stressed that Mr. Sawatzky's offer clearly was not "made under circumstances which could reasonably have been perceived to have been offensive" and thus, that the court's reasoning did not fit the facts of Mr. Sawatzky's as-applied challenge.

priate" public speech introduced into this case. The argument that the legality or illegality of the underlying conduct necessarily determines the constitutionality of this solicitation offense has been timely and properly raised at every stage of the state court proceedings.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ and address the important First Amendment issues posed by this case for at least three reasons. First, in relying upon the presumed sensibilities of potential listeners to outlaw speech on an "inappropriate" subject for public discussion, the court below violated a core First Amendment principle and ignored numerous contrary decisions of this Court. Second, the court's ruling created a substantial overbreadth problem, for its purportedly legitimate government purpose does not come close to justifying the extremely broad sweep of Oklahoma City's solicitation offense. Third, these errors were made with regard to a type of speech -- an offer to participate in private, consensual sexual activity -- that has confused the lower courts, causing a split among state courts of last resort in their analysis of the First Amendment's application to such speech. Thus, a decision from this Court could not only correct significant federal constitutional missteps in Mr. Sawatzky's case, but could also provide needed clarification for the many state court judges reviewing similar prosecutions throughout the country.

Two issues *not* contested by Mr. Sawatzky also bear summarizing at the outset. Petitioner does not dispute the well-established proposition that the solicitation of criminal activity is unprotected by the First Amendment, provided of course that the conduct solicited is validly outlawed. *See, e.g., Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961) ("solicitation of crime" outside protection of First Amendment). Indeed, Mr. Sawatzky has emphasized throughout

this litigation that the critical determination is whether or not the underlying sexual activity can validly be proscribed and that the Oklahoma court erred by failing to make that determination in the first instance. Petitioner also does not challenge the ability of government to enact content-neutral criminal provisions that outlaw harassment, provided those statutes require a perpetrator to do more than simply approach or annoy another.

By contrast, what the Oklahoma Court of Criminal Appeals was left with in this case -- after explicitly disengaging the punishment of Mr. Sawatzky's expression from any possible justification based on the criminal nature of the conduct solicited -- was a bare content-based limitation on speech. Oklahoma City's ordinance triggers punishment whenever a particular message, an offer to participate in certain sexual acts, has been expressed.[4] Once any tie to the underlying criminalized conduct is set aside, as the court below did, such a content-based burden on speech is presumptively unconstitutional and can be upheld only if it is narrowly tailored to serve a compelling state interest. *See Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105, 115, 118 (1991). Yet Oklahoma City did not even attempt to satisfy that exacting standard (*see* Appellee's June 26, 1995, brief), nor could it have. Instead, the court of appeals itself devised an *impermissible* government purpose and found that purpose wholly sufficient to justify Mr. Sawatzky's punishment.

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[4] Not only the explicit language of the ordinance, but also the reasoning below shows that Mr. Sawatzky's conviction was based upon the substantive content of his statement to Officer Ledford, and not based in any part on the manner in which the offer was communicated. The court of criminal appeals reasoned that "the unique status of sexual conduct in our culture" made offers relating to that topic "simply not appropriate in public places" (App. 4a n.7); never in the opinion did it even mention the actual words Mr. Sawatzky used to express his solicitation.

I. THE HOLDING BELOW CONTRADICTS PRIOR DECISIONS OF THIS COURT ON A CENTRAL FIRST AMENDMENT PRINCIPLE AND CREATES A SUBSTANTIAL OVERBREADTH PROBLEM

A. Protecting Listeners From One, Disfavored Category Of Speech On The Basis Of Content Is Not A Legitimate State Interest

The Oklahoma Court of Criminal Appeals wrongly concluded that protecting possible listeners from an "inappropriate" or taboo message constitutes a "legitimate governmental interest." (App. 4a). As this Court wrote in *Texas v. Johnson*, 491 U.S. 397 (1989), supporting the proposition with citation to thirteen prior cases, the very premise of the First Amendment is that government can never act based upon the "objectionable" nature of speech content: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

Far from relying exclusively on such an interest to justify the punishment of speech, as the decision below approved, government must "disclaim[] . . . any state interest in suppress[ion] . . . out of solicitude for the sensibilities of" those who might hear the disfavored message in order to have any chance of complying with the First Amendment. *Simon & Schuster v. Crime Victims Board*, 502 U.S. at 118 (emphasis added). In *Simon & Schuster*, this Court emphasized that "'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Id.* (quoting *Hustler Magazine v. Falwell*, 485 U.S.

46, 55 (1988), which in turn quotes *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)).

This "bedrock" First Amendment principle applies equally to expression that relates to sexual behavior or contains sexually charged images, provided that the expression is not obscene. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)("[s]exual expression which is indecent but not obscene is protected by the First Amendment" and cannot be criminalized for an adult audience simply because it is deemed "indecent"); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983).

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975), for example, the city sought to ban films containing nudity from drive-in movie screens, arguing that government "may protect its citizens against unwilling exposure to materials that may be offensive." The Court disagreed:

> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.

Id. at 210. The *Erznoznik* decision -- though noting that in "narrow circumstances," such as the home, there might be cognizable privacy interests -- underscored that the normal and easy recourse for any offended viewer is simply "to 'avoid further bombardment of [his] sensibilities by averting [his] eyes.'" *Id.* at 210-11 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

Similarly, in *Cohen*, the Court overturned a criminal conviction for "disturbing the peace by offensive conduct."

See 403 U.S. at 16. Cohen had worn a jacket with "Fuck the Draft" written on it while in the Los Angeles County Courthouse. This Court strongly rejected any contention that Cohen's punishment could be based upon "the substantive message" his expression conveyed. *Id.* at 19. Furthermore, the Court wrote that "'so long as the means are peaceful, the communication need not meet standards of acceptability'" and that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Id.* at 25-26 (citation omitted).

Especially in a public setting, the Court put the burden on unwilling and offended recipients to remove their eyes or ears from disquieting expression, and refused to allow the government to outlaw "offensive" speech to protect listeners. Indeed, the Court in *Cohen* used the example of "strolling through Central Park" as the quintessential public setting where a citizen could have no constitutionally legitimate expectation of government protection from unwanted and unsettling communication. *Id.* at 21.

Here, Mr. Sawatzky has been criminally prosecuted for his conversation with another adult in a public park. The court of criminal appeals upheld his conviction based solely on its conclusions that sexual propositions are "inappropriate" in public places and that government can legitimately seek to "protect" listeners from such expression.

That decision represents a fundamental misunderstanding of the First Amendment. *See, e.g., Simon & Schuster v. Crime Victims Board*, 502 U.S. 105; *Texas v. Johnson*, 491 U.S. 397; *Erznoznik v. Jacksonville*, 422 U.S. 205; and *Cohen v. California*, 403 U.S. 15. Petitioner respectfully submits that the writ should issue to correct this state high court's significant error, which not only affects Mr. Sawatzky but also will affect the many other individuals who

are arrested in the future under Oklahoma City's ordinance and under similar laws in other cities and states.[5]

B. Even Assuming *Arguendo* That Protecting Recipients From Unwanted Public Sexual Offers Constitutes A Valid Government Interest, This Ordinance Is An Unconstitutionally Overbroad Means Of Serving Such An Interest

The Oklahoma Court of Criminal Appeals reasoned that "this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy." The court concluded -- in violation of the First Amendment, *see* Point IA, *supra* -- that the city could do so to "protect" its citizens from unwanted and "inappropriate" public sexual offers. Such a characterization of the Oklahoma City ordinance renders it substantially overbroad and makes Mr. Sawatzky's punishment under the statute unconstitutional, even if the asserted government interest were legitimate.

Contrary to the purported aim of the ordinance, the language of the provision does not limit punishment to solicitations that take place in public. Rather, *any* conversation, no matter how private, that includes an offer to participate in any "indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not" the speaker's spouse is swept within this law and is subject to criminal punishment. Likewise, there is no requirement in the ordinance that a sexual offer be unwanted, be thought "inappropriate" by the

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[5] As the record in this case shows, Oklahoma City police regularly patrol Hobie Point with the goal of arresting individuals who, in the course of conversations with undercover officers, make sexual propositions. (Tr. Trans. 101).

recipient, or be lewd itself before the arm of the state steps in. A welcomed, decorous proposal to engage in lawful, common sexual activity from one member of a long-standing (but unmarried) couple to the other, in the privacy of their own home, is as unlawful here as a public, loud and vulgar offer shouted to a repulsed stranger in a singles bar. Mr. Sawatzky's own situation illustrates that a solicitation can be strongly encouraged by the recipient and still trigger prosecution, though it has neither surprised nor offended anyone.

Like the ordinance ruled unconstitutionally overbroad in *City of Houston v. Hill*, 482 U.S. 451 (1987), this provision "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily . . . yet only some individuals -- those chosen by the police in their unguided discretion -- are arrested." *Id.* at 466-67. Moreover, as in *Houston v. Hill* and *Erznoznik v. Jacksonville*, 422 U.S. at 212-15, much of the protected speech that is outlawed by this ordinance bears no relationship to the purported goal of the measure. Such an ordinance "plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech" and should be struck down on its face. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980).

The court of criminal appeals ruling, therefore, warrants review and correction on this score as well. In attempting to sidestep the critical issue of whether or not the underlying sexual act offered in this case is constitutionally proscribable in Oklahoma, the state court not only turned to an impermissible government interest, but also created a basis for facially striking the law due to its substantial overbreadth.

II. THE DECISION BELOW AND THE ANALYSIS OF OFFERS TO PARTICIPATE IN SEXUAL ACTS BY OTHER STATE COURTS HAVE CREATED A CONFUSING PATCHWORK OF RULINGS ON THE IMPORTANT FREE SPEECH ISSUES INVOLVED

The prevalent type of arrest at issue here has engendered much doctrinal confusion in the state courts, providing another ground for granting the writ. State courts have treated offers to participate in sexual acts in at least three different ways. First, as in this case, some courts have simply acceded to a government interest in shielding the sensibilities of potential recipients, despite that interest's illegitimacy, *see* Point IA, *supra*. Second, the courts in Ohio have improperly labelled sexual solicitations "fighting words" and thereby excluded them from the First Amendment's protection. *See, e.g., State v. Phipps*, 389 N.E.2d 1128 (Ohio 1979); *State v. Presley*, 612 N.E.2d 353 (Ohio Ct.App. 1992). Third, other courts have correctly struck down offenses that punish offers of lawful sexual activity or limited punishment to the solicitation of unlawful acts.[6] *See, e.g., State v. Neal*, 500 So. 2d 374 (La. 1987); *Commonwealth v. Sefranka*, 414 N.E.2d 602 (Mass. 1980). Even within the

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[6] This result recognizes that solicitations to commit a crime are a "categorical" exception to the First Amendment and not generally protected thereby, while at the same time recognizing that other sexual solicitations, inviting lawful activity, constitute protected expression and cannot constitutionally be subject to content-based regulation by the state.

If the third, proper approach had been followed in this case, the Oklahoma Court of Criminal Appeals would have proceeded to decide whether same-sex fellatio could be constitutionally prohibited in Oklahoma -- particularly under the Oklahoma state constitutional right to privacy and under the state and federal rights to equal protection -- and then, based upon the result of that analysis, either overturned or upheld Mr. Sawatzky's conviction.

third group, however, the reasoning of some state high courts muddies the governing First Amendment rules, *see, e.g., State v. Uplinger*, 447 N.E.2d 62 (N.Y.), *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984); *Pryor v. Municipal Court*, 599 P.2d 636 (Cal. 1979); or ignores the freedom of expression aspect of solicitation cases entirely, *see, e.g., Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Such disparate outcomes, corrosive of the First Amendment's proper meaning, signal the need for new guidance from this Court.

In *Phipps*, for example, the Ohio Supreme Court began by making the same mistake as the Oklahoma court below, finding it "a legitimate exercise of the police power" to protect citizens from the "injurious" emotional impact of "homosexual solicitations." 389 N.E.2d at 1133. The *Phipps* opinion reasoned that, contrary to core First Amendment doctrine,

> [i]t is beyond cavil that this is a legitimate exercise of the police power . . . . Those who would have this court believe that the average citizen would not find homosexual solicitation of the nature proscribed . . . to be injuriously offensive are guilty of murky thinking. The type of expression proscribed in the statute may have been acceptable in a more barbarous age when human dignity had not reached the level expected by citizens in our modern society.

389 N.E.2d at 1133.[7]

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[7] Even in *Uplinger* -- a case in which the New York Court of Appeals reached the right result and overturned a conviction for loitering-to-solicit consensual sodomy because the underlying sodomy statute had been (continued...)

The Ohio court recognized, however, the difficulties posed by this Court's rulings in such cases as *Cohen*. *See* 389 N.E.2d at 1133. It ultimately construed the requirement that "[n]o person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard," Ohio Rev. Code §2907.07 (B), to cover "fighting words" and thus to be constitutional. In terming a sexual offer that might be "grossly offensive and emotionally disturbing" "fighting words," 389 N.E.2d at 1134, *Phipps* impermissibly expanded and distorted the extremely narrow "fighting words" concept. *See Gooding v. Wilson*, 405 U.S. 518, 527 (1972)(striking down purported "fighting words" definition that "makes it a 'breach of the peace' merely to speak words offensive to some who hear them"). The *Phipps* holding, as the dissent there wrote, "seriously blurs the long-standing distinction between fighting words and merely offensive speech." 389 N.E.2d at 1135 (Sweeney, J., dissenting).[8]

Some state courts have avoided the traps of viewing sexual offers as "offensive" overtures citizens need protec-

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[7] (...continued)
struck down as unconstitutional in another case -- the court incorrectly hinted that if the offense had required that the sexual offer be "in any way offensive or annoying to others," that fact might have allowed such prosecutions to continue, despite the lawfulness of the underlying act offered. 447 N.E.2d at 63.

[8] Prosecutions punishing sexual solicitations as "fighting words" continue to be upheld by the Ohio courts. *See, e.g., Presley*, 612 N.E.2d at 354 (same-sex sexual offer found to be "grossly offensive and emotionally disturbing"; "average person would be provoked to a breach of the peace by such words"). *See also Pryor*, 599 P.2d at 646 n.11 (incorrectly intimating that a public solicitation for a private lawful sexual act could be punished where its "offensive words" were "inherently likely to provoke an immediate violent reaction").

tion against or as "fighting words." Those courts have properly tied the government's ability to prohibit sexual solicitations to whether or not the solicited act is itself unlawful. As the Virginia Supreme Court held, an ordinance outlawing solicitations of "lewd, lascivious, [and] indecent" acts must, to save it from First Amendment infirmity, "be narrowly construed to proscribe the solicitation of only those acts which, if consummated, would constitute criminal offenses . . . . First Amendment protection is not afforded statements made in the solicitation of criminal acts." *Pedersen v. City of Richmond*, 254 S.E.2d 95, 98 (Va. 1979).[9] If a solicitation statute cannot be so construed by the state's judiciary, it must be declared void. *State v. Tusek*, 630 P.2d 892, 894-95 (Or.Ct.App. 1981)(the challenged "accosting" statute "makes it a crime to ask another person to participate in an act which is not itself a crime" and is not susceptible to another construction; it "prohibits speech that comes within the . . . First Amendment . . . [and] is therefore void").[10]

In this case, though, the Oklahoma Court of Criminal Appeals joined the ranks of the state courts that "have struggled with this problem," (App. 4a n.7), and that have

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[9] *See also Sefranka*, 414 N.E.2d at 608 ("by limiting the speech proscribed to the solicitation of particular public sexual conduct which is itself criminal, the construed provision does not reach speech protected by the First Amendment"); *Pryor*, 599 P.2d at 646. The Louisiana Supreme Court, in *Neal*, upheld a statute prohibiting solicitation for the "crime against nature" under the related, but not exactly pertinent, standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See* 500 So. 2d at 377-78 ("[t]he offender's conduct and speech are directed to inciting or producing [the] imminent lawless act[] of . . . crime against nature").

[10] *See also Uplinger*, 447 N.E.2d at 63 ("Inasmuch as the conduct ultimately contemplated by the [loitering-for-purposes-of-solicitation] statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose"; statute was "aimed at proscribing overtures . . . leading to what" now is a lawful act).

analyzed solicitation prosecutions in ways that violate the First Amendment. The Court should grant the writ to clarify the governing federal constitutional rules for those state courts.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set for a full hearing by the Court. In the alternative, *certiorari* should be granted and the decision below summarily reversed, sending the case back to the Oklahoma Court of Criminal Appeals for further proceedings.

Respectfully submitted,

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Dated: February 12, 1996

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH B. SAWATZKY,	)	
	)	
Appellant,	)	FOR PUBLICATION
	)	
v.	)	No. M-94-1309
	)	
THE CITY OF OKLAHOMA CITY,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, V.P.J.:

Kenneth B. Sawatzky was found guilty by a jury on November 14, 1994, of Offering to Engage in an Act of Lewdness in violation of Oklahoma City Municipal Code 1993, Chapter 30, Section 30-152, in Oklahoma City Municipal Court, Case No. 94-4237631. Sawatzky was formally sentenced on December 1, 1994. He was fined $250.00 and ordered to pay $105.00 in court costs. Sawatzky applied to place his appeal on the Accelerated Docket of this Court pursuant to Rule 11.3 of the *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.1995, Ch. 18, App. The appeal was thereafter assigned to the Accelerated Docket. On February 13, 1995, Sawatzky filed a Motion for Removal from the Accelerated Docket that was subsequently denied.

This case is neither about the regulation of conduct - between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons.

Fundamentally, this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy. Sawatzky solicited an act of lewdness[1] in a public place from a police officer. The act solicited was intended to take place in private and Sawatzky and the officer are members of the same gender. In this context it is clear that Sawatzky is not entitled to relief.

In his first proposition of error Sawatzky claims that Sections 30-151 and 30-152 violate his right to privacy as guaranteed under the Oklahoma Constitution. This Court has yet to reach the question of whether the right to privacy extends to private non-commercial sodomy between consenting adults of the same gender,[2] and the United States Su-

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[1] Oklahoma City defines lewdness as:

> a. any lascivious, lustful or licentious conduct,
>
> b. the giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct with any person not his or her spouse, or
>
> c. any act in furtherance of such conduct or any appointment or engagement for prostitution.

Oklahoma City Municipal Code 1993, Chapter 30, § 30-151. This definition may be overbroad from a constitutional standpoint. In addition to proscribing acts of sodomy it also proscribes vaginal intercourse and masturbation. However, this Court addresses only the fellatio portion of this definition, clearly an act of sodomy, because it is the only portion implicated by the facts of this case and because Sawatzky failed to attack the ordinance as overbroad.

[2] *Post v. State*, 715 P.2d 1105, 1110 (Okl.Cr.), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986)("We do not reach the question of homosexuality since the application of the statute to such conduct is not an issue in this case. Our holding today is simply to declare unconstitutional the application of section 886 to the facts of this case."). For a thorough discussion of Oklahoma's sodomy jurisprudence, *see* (continued...)

preme Court has expressly refused to extend the equivalent right under the federal constitution to individuals who engage in such conduct.[3] We decline to reach the issue here because this case involves a public solicitation and nothing more.

In his second and third propositions Sawatzky claims that Sections 30-151 and 30-152 violate his right to equal protection. The second proposition is based on the state constitution and the third proposition is based on the federal constitution. The right to equal protection guaranteed under Oklahoma's Constitution has consistently been interpreted as coextensive with the right to equal protection guaranteed under the federal constitution.[4] Consequently, we address these propositions together.

Sawatzky invites this Court in his second and third propositions to determine whether same sex adults may lawfully engage in private non-commercial consensual sodomy. We declined to reach this issue in *Post* because the facts of that case did not warrant such a determination.[5] Likewise, the facts of Sawatzky's case do not warrant a determination of this issue and we do not address it.

This case involves a public solicitation for acts defined

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[2] (...continued)
Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 Am J. Crim. L. 37 (1993).

[3] *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

[4] *Callaway v. City of Edmond*, 791 P.2d 104, 106 n.1 (Okl.Cr. 1990) ("Our due process clause in Art. 2 Sec. 7, Okl. Const., has a definitional range that is coextensive with its federal counterpart . . . .").

[5] *Post*, 715 P.2d at 1110.

by Oklahoma City as lewd under Section 30-151. Section 30-151(1)(b),[6] creates an exception for married persons in the definition of lewdness. The married person exception is the only distinction between groups contained in the text of Sections 30-151 and 30-152. Because Sawatzky is not a member of a suspect or quasi-suspect class, we will examine Sawatzky's equal protection claim under the rational basis test. Among other things Sections 30-151 and 30-152 are designed to protect persons from being asked by others to engage in sexual activity. Protecting citizens from solicitations for sexual acts is a legitimate governmental interest.[7]

---

[6] "[T]he giving or receiving of the body for indiscriminate sexual intercourse, fellatio, cunnilingus, masturbation, anal intercourse, or lascivious, lustful or licentious conduct *with any person not his or her spouse*[.]" (emphasis added). Although the dissent seems to indicate that a married person would be permitted under the statute to publicly solicit any person for the purpose of engaging in private non-commercial consensual sodomy, this is clearly not the case. The married person exception applies only to solicitations made by persons who are married to each other.

[7] We are aware that our holding implicates other constitutional provisions including the First Amendment right to free speech. The free speech issue is significant and cannot be ignored even though we are declining, in this case, to decide whether or not same sex sodomy is lawful. The issue arises because it is generally recognized that government should not prohibit the solicitation of conduct that is not unlawful. Other courts have struggled with this problem and have reached to resolve the issue with questionable application of existing rationales such as the "fighting words" doctrine. *State v. Phipps*, 389 N.E.2d 1128, 1133-34 (Ohio 1979). In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable. Of course, equally pernicious are those laws which go too far in trying to regulate

(continued...)

The distinction found in Section 30-151, exempting married persons from the definition of lewdness, logically recognizes that such solicitations may be a consequence of the marital relationship.[8] Therefore, we hold that the married person exception is rationally related to a legitimate governmental interest and does not violate the right to equal protection guaranteed by the Oklahoma and federal constitutions.[9]

In his final proposition of error Sawatzky contends that Sections 30-151 and 30-152 violate his rights under Article I, Section 2 of the Oklahoma Constitution. Essentially Sawatzky's claim is that Sections 30-151 and 30-152 are impermissibly founded on religious beliefs in violation of the establishment clause. This claim is unsupported by the record and is denied.

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[7] (...continued)
our private activities. As noted above, the ordinances in question, §§ 30-151 and 30-152, may very well go too far in attempting to regulate private activities. *Supra* note 1. As applied in this case, however, Sawatzky's First Amendment rights were not violated.

[8] We are of the opinion that within the marital relationship the parties to the relationship impliedly consent to sexual solicitations (not sexual acts) and, thus, the City's exception of married persons is entirely reasonable and rationally related to the purposes of the ordinances.

[9] On facts similar to this case the Kentucky Supreme Court found that a statute prohibiting homosexual sodomy was unconstitutional under the Kentucky Constitution. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Wasson was actually charged under a statute that made solicitation for any criminal offense unlawful. *Id.* at 488. Although factually similar, *Wasson* is not helpful in this case because it is based solely on Kentucky's Constitution which is substantially different from Oklahoma's Constitution.

AN APPEAL FROM THE MUNICIPAL COURT OF OKLAHOMA CITY

THE HONORABLE EMILY KAYE LONIAN, MUNICIPAL JUDGE

Kenneth B. Sawatzky was convicted of Offering to Engage in an Act of Lewdness (Oklahoma City Municipal Code 1993, Chapter 30, Section 30-152), fined $250.00 and ordered to pay $105.00 in court costs. Sawatzky's Judgment and Sentence for Offering to Engage in an Act of Lewdness is AFFIRMED.

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OPINION BY: CHAPEL, V.P.J.
LUMPKIN, J.: concur
LANE, J.: concur
STRUBHAR, J.: dissent

RA

STRUBHAR, JUDGE: DISSENT

The majority in its opinion has stated that this case is not about the regulation of conduct between consenting adults in the privacy of their bedrooms or about the legal status to be provided to homosexual persons. Rather, it has held that this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy. Under the specific facts of this case, I agree that this limited approach is appropriate. It is with the majority's ensuing analysis that I disagree.

The opinion notes that the sections of the Oklahoma City ordinance under which Appellant was convicted exempt married persons from the definition of lewdness.[1] Accordingly, non-married persons can be convicted of offering to engage in certain acts which are legal for married persons to solicit. It is the reasoning of the majority that it is lawful to distinguish between married persons and non-married persons for purposes of solicitation of lewd acts because such solicitations are a consequence of the marital relationship to

[1] *See* Oklahoma City Municipal Code Sections 30-151 and 30-152.

which its parties have impliedly consented. Although ambiguous, this language seems to imply that dissimilar treatment of married and non-married persons is justified because public solicitation of lewd acts by non-married persons is likely to offend whereas solicitation to participate in lewd acts by married persons to one another is not. Accordingly, the majority seems to indicate that there is a legitimate governmental interest in protecting unmarried persons from offensive solicitations to engage in lewd acts.

Assuming, arguendo, that this is a valid governmental interest, I would note that such situation was not implicated by the facts of this case. The record in this case clearly supports a finding that the language spoken by Appellant which was construed to be an offer to engage in lewd acts was not made under circumstances which could reasonably have been perceived to have been offensive. Rather, as is evinced by the testimony of the arresting officer, Appellant was purposefully led to believe that a sexual solicitation would be welcome. Nothing in this situation indicated that the solicitation was unwelcome or offensive. Although the majority opinion states in footnote 7 that "reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful" the municipal ordinance prohibits both invited and offensive solicitations and to this extent, it imposes unreasonable restrictions. Accordingly, I dissent.

(2)

Supreme Court, U.S.
FILED
MAR 19 1996
CLERK

No. 95-1294

In The

Supreme Court of the United States

October Term, 1995

KENNETH B. SAWATZKY,

Petitioner,

v.

CITY OF OKLAHOMA CITY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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327

ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Petitioner's First Amendment rights were not violated by his conviction.

2. The federal question of the free speech clause of the First Amendment of the United States Constitution was not pressed or passed on in the Court of Criminal Appeals of the State of Oklahoma and therefore, this Court does not have jurisdiction over this Petition for Writ of Certiorari.

3. Sections 30-151 and 30-152 of the Municipal Code of the City of Oklahoma City (1993), as applied to Petitioner, are not overbroad.

4. This Court cannot issue advisory opinions to state courts.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Oklahoma City ("the City"), respectfully prays that this Court deny Petitioner's Petition for Writ of Certiorari filed herein.

STATEMENT OF THE CASE
FACTUAL BACKGROUND

On March 1, 1994, the City Council of the City of Oklahoma City amended its "offer to engage in a lewd act" prohibition ordinance to read as recited in Petitioner's Petition.[1] Even prior to this Amendment and prior to the Petitioner's arrest on July 6, 1994, the City had posted signs at Hobie Point in Lake Hefner, advising people at the lake that undercover officers would be in the area. (Tr. 101.) This lake area, including this peninsula, is used for sailing, fishing, bird watching, a Boy Scout Explorer troop, model airplane flying, and other nature activities. (Tr. 97, 99-100.)

On the day of Petitioner's arrest, an undercover male police officer was assigned to work the Hobie Point area by his supervisor, as the police had received numerous

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[1] On December 19, 1995 the City Council of the City of Oklahoma City amended Section 30-152 of the 1993 Municipal Code to read as follows:

> (a) No person shall, *in a public place,* engage in or offer to engage in any act of prostitution or other act of lewdness or to solicit, induce, entice, or procure another to commit or engage in any act of prostitution or other act of lewdness. (Emphasis added.)

complaints as to moral violations occurring at this location. (Tr. 98, 105.) The officer was leaning up against his car when the Petitioner walked past him, smiled at him, and asked the officer if he had a cigarette. (Tr. 107.) The officer struck up a conversation with Petitioner. The Petitioner eventually advised the officer that he wanted to go to the officer's hotel and take a shower. (Tr. 111.) As the two were leaving the area, the officer asked the Petitioner what "he liked to do." (Tr. 113.) The Petitioner responded "I like it all." (Tr. 120.) The officer again asked the Petitioner what he liked to do. The Petitioner responded "I want to suck a dick." (Tr. 113.) The Petitioner was arrested and charged with a violation of § 30-151 and § 30-152 of the Municipal Code of the City of Oklahoma City.

Proceedings in the Oklahoma Courts:

On August 8, 1994 an amended information was filed in the Municipal Court of the City of Oklahoma City, charging that Petitioner:

> [O]n or about Jul 6, 1994 at 1:30 pm at or near 3298 W. Britton Road, within the corporate limits of the City of Oklahoma City, State of Oklahoma the Sawatsky [sic], Kenneth, did then and there willfully, wrongfully and unlawfully commit the crime(s) of:
>
> Count #1: Offering to engage in an act of lewdness by committing the following acts: (1) Kenneth Sawatsky [sic] asked Officer Ledford, not his spouse, "If we could go there (Holiday Inn) to take a shower" . . . , an act in furtherance of an act of lewdness; (2) Kenneth Sawatsky [sic]

> told Officer Ledford "I want to suck a dick", an act of lewdness by giving or recieving [sic] of the body for fellatio with a person not his spouse, contrary to the provisions of Oklahma [sic] City Municipal Code Section 30-151, Ordinance Number 20114, and against the peace and dignity of the City of Oklahoma City.

This amended information was served on the Petitioner by certified mail on August 9, 1994.

On July 27, 1994, Petitioner filed a Motion to Dismiss and Brief In Support. Petitioner's Brief argued that the information should be dismissed because the Municipal Code Sections violated (1) his right to privacy under art. 2, §§ 2 and 7, of the Constitution of the State of Oklahoma; (2) his right to equal protection under art. 2, § 7, of the Oklahoma Constitution and under the Fourteenth Amendment to the United States Constitution; and (3) his rights under the establishment clause of the First and Fourteenth Amendments to the United States Constitution and art. 1, § 2, of the Oklahoma Constitution. The Petitioner apparently argued that his state right of privacy was violated because consensual same gender sexual acts must now be lawful as the Oklahoma Court of Criminal Appeals had held in *Post v. State*, 715 P.2d 1105 (Okla. Cr. 1986), *rehearing denied*, 717 P.2d 1151 (Okla. Cr. 1986), *cert. denied, Oklahoma v. Post*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986), that Oklahoma's sodomy prohibition, 21 O.S. § 886, was unconstitutional as applied to consensual non-commercial, heterosexual sodomy. The Petitioner's equal protection argument alleged, without any facts to support it, that these code sections were being enforced only against homosexual males – which

Petitioner claims was a suspect class – as is defined in equal protection cases. Petitioner's establishment clause argument was that the same-sex sodomy prohibitions are illegally based upon tenets of the Christian Church.

The Petitioner's Motion to Dismiss was set for oral argument on September 1, 1994. The Petitioner's counsel stated during this argument that "[w]e have not been alleging in our attack on the ordinance, the previous ordinance or the amended ordinance, a vague and overbroad argument. We could have made that argument." (September 1, 1994, Tr. 21.) Further, at page 23, Petitioner's counsel stated: "We have not attacked this on vagueness and overbreadth. . . . " The only free speech argument appears to be that raised orally at pages 6 and 7, when Petitioner argues that if the underlying conduct was lawful "then you certainly have the constitutional right to ask someone to commit these consensual acts." The Municipal Court denied the Motion to Dismiss, and the case was set for trial.

On November 27, 1994, this case was tried to a jury. The City called one witness: the undercover officer, and rested. The Petitioner called no witnesses and rested. The defense again moved to dismiss and argued at Tr. 126-127:

> It seems to me that to be arrested under the ordinance that they brought, a person has to make a proposal to someone not his spouse to engage in sexual relations with a person not his spouse, not to discuss academically an interest in sexuality. . . .
>
> Now, Your Honor, in our motion to dismiss, we outline several other constitutional bases that

> we don't want to be construed to have waived, but with your permission, I will not restate those this afternoon, our reliance on the post-case, our reliance upon violation of equal protection and the enforcement of this, and then the violation of First Amendment protection both of free speech and entanglement of church and state, unless the Court desires for me to revisit those issues.

The Court overruled the Motion to Dismiss. The jury found the Petitioner guilty and set his punishment at a $250 fine.

The Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals. The Petitioner raised the same arguments as was contained in his written Motion to Dismiss filed in the Municipal Court on July 27, 1994. The City asserts that the only issues Petitioner properly preserved can be summarized as follows:

(1) Whether Oklahoma City's Municipal Code §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right to privacy, as guaranteed under art. 2, §§ 2 and 7, of the Oklahoma Constitution.

(2) and (3)
Whether Oklahoma City's Municipal Code, §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right to equal protection, as guaranteed under art. 2, § 7, of the Oklahoma Constitution and under the Fourteenth Amendment to the United States Constitution.

(4) Whether Oklahoma City's Municipal Code, §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right guaranteed under art. 1, § 2,

> of the Oklahoma Constitution, pertaining to protection of religious expression, comparable to the Establishment Clause of the First Amendment of the United States Constitution.

It is the City's contention that Petitioner has waived any argument as to the alleged constitutional infirmities on these ordinances, based upon the free speech clause of the First Amendment of the United States Constitution, either on a claim of facial overbreadth or as applied, by his failure to assert them in the highest state court. (See Propositions 2 and 3.) The only new argument was that the City had failed to argue a "compelling interest" in response to his equal protection and establishment arguments.

On November 12, 1995, the Court of Criminal Appeals issued its opinion, which upheld the Petitioner's Municipal Court conviction. The Court declined to decide Petitioner's privacy argument and held that, because Petitioner's status was neither *quasi*-suspect nor suspect, the City need only to show a rational basis for its ordinances and, as applied, the Petitioner's conviction for a public solicitation of a sexual act, regardless of whether the underlying sexual act was legal, was valid. The Court held in a footnote that the Petitioner's First Amendment "free speech" rights were not violated because:

> [R]easonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is

> simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

(Pet. App., p. 4a, n.7.)

REASONS FOR DENYING PETITIONER'S PETITION

Since the date of Petitioner's arrest on July 6, 1994, this case has always been about whether the City could prohibit any person from offering to engage in an act of lewdness. The Petitioner attempted to turn this into a case to decide whether consensual non-commercial private same-sex sodomy is lawful under Oklahoma's Constitution. The Oklahoma Court of Criminal Appeals properly refused to decide this issue and held that, as applied, the City's ordinances lawfully prohibited the Petitioner from stating in a public place, to an undercover officer, "I want to suck a dick," under circumstances later determined by a jury to have constituted an offer to engage in lewd conduct. The Petitioner's Motion to Dismiss claimed to raise the free speech issue in the Municipal Court of Oklahoma City. He did not brief the issue. He mentioned his free speech claim again during his Demurrer to the evidence. (Tr. 126-127.) His Brief in the Court of Criminal Appeals did not raise the free speech issue. This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), since Petitioner neither pressed at the appellate stage nor did the Court of Criminal Appeals fully present the issue of whether the Oklahoma City Municipal Code, §§ 30-151 and 30-152 (1993), violated Petitioner's free speech rights, pursuant to the First Amendment of the Constitution of the United

States. Further, the Petitioner's counsel specifically advised the Municipal Court that he was not attacking the ordinance as "overbroad." (September 1, 1994, Tr. 21, 23.) For these reasons alone, this Court should deny the Petition, but if not, the City asserts that this Court should deny the Petition in that the Petitioner's own First Amendment rights were not violated, and that, as he was lawfully convicted, Petitioner cannot assert that the ordinance might violate the rights of others. Lastly, it appears that Petitioner is requesting that this Court require that the Oklahoma Court of Criminal Appeals decide the issue of the legality of homosexual sodomy under the Oklahoma Constitution.

Proposition No. 1. Petitioner's First Amendment Rights Were Not Violated by His Conviction.

Petitioner assumes that the City cannot lawfully prohibit a person from attempting to solicit a sexual act when that person states "I want to suck a dick," absent a compelling interest. Petitioner further asserts that protecting "listeners" from overhearing the solicitation is not a compelling interest. The Petition does not address the protection of those who may be offended by these in-person solicitations. The City asserts that Petitioner's argument is contrary to numerous cases of this Court.

It is important to note that the Petitioner was not engaging in a political debate over the legality or morality of his status as a homosexual at the time of his arrest, but was instead attempting to solicit a person of the same sex into committing an act that is still illegal under Oklahoma law. (21 O.S. § 886.) Secondly, Petitioner argues that

ordinances like the ones at issue can only be valid if the underlying conduct is validly proscribed. If this is the case, then by the same argument, any law protecting citizens from libel, slander, misrepresentation, false advertising, unfair debt collection actions, stalking, or harassment is invalid as the violator could claim that as the underlying conduct was not illegal, the prohibition would be violating his First Amendment's freedom of speech right.

This Court has long recognized that not all speech is entitled to the protection of the First Amendment. In *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), this Court stated "[i]n light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." And this Court, quoting from its prior opinion in *Thornhill v. State of Alabama*, 310 U.S. 88, 101, 102, 60 S.Ct. 736, 84 L.Ed. 1093, 1102 (1940), stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment.

Roth, 354 U.S. at 487. (Court's emphasis.)

In *Roth*, this Court held obscene material was not protected by the First Amendment. The test of obscenity was redefined in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 37 L.Ed.2d 419, 431 (1973), when this Court gave as an example several types of material that could be lawfully determined to be obscene. This Court stated:

> It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. . . .

See also Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), wherein this Court reaffirmed that material designed for and disseminated to a clearly defined deviant sexual group that appeals to the prurient interest in sex of the members of that group could be held to be obscene. The City submits that Petitioner's statement, "I want to suck a dick," meets the definition of obscenity as defined by this Court in *Roth*, and *Miller*, as it describes the ultimate sex, whether homosexuals are labeled "deviant." This statement was not made as part of a political protest or a public statement concerning the issues of gay rights and the Petitioner's citations to this Court's opinions involving public expressions of a political statement [*Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *appeal dismissed, cert. denied, Hill v. City of Houston, Tex.*, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987)], are not relevant to the facts of this case.

Even if this Court were to hold that Petitioner's speech was protected by the First Amendment, the question remains as to how much protection it is to be afforded. In various contexts, this Court has in fact

looked to the content of the speech to see how much protection is to be afforded. For instance, in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), this Court held that a public figure must show a false statement of fact made with actual malice before recovering damages for intentional infliction of emotional distress, whereas, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), this Court held that in matters not involving "public concern" no showing of actual malice was needed to recover damages for a false statement. Thus, the content of the speech must be examined to determine if a false statement is made, and if the person or the "matter" was of public concern. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69-71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), this Court stated:

> Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.
>
> Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

More on the point of this case, this Court stated in *Dun & Bradstreet*, that: "[w]e have long recognized that not all speech is of equal First Amendment importance.[5]

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[5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. . . . "

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 785 and n.5.

In *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), this Court stated:

> Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in Pacifica Foundation, that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." 438 US, at 747, 57 L Ed 2d 1073, 98 S Ct 3026.

In *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 746-747, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), this Court stated:

> If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four letter-words – First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. (Footnote omitted.) Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766.
>
> . . .
>
> Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection

> accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another.

The Petitioner argues that the City failed to express any compelling state interest in attempting to prohibit the solicitation of certain sexual acts. The City disagrees with this argument for two reasons. Initially, the City would assert that even if some state reason is required to prohibit offers like the Petitioner's, it is not required that the interest be "compelling." Secondly, the undercover officer testified as to the interest to be protected: that this public park was used by children, sailboaters, and nature lovers; that the City has tried to warn off the people using the park illegally, and that the police department still received "numerous" complaints. Lastly, the Petitioner's Petition at Proposition II, pages 14-18, cites some eight cases from seven different jurisdictions, all of which concern attempts to prohibit the same type of conduct as Petitioner's. The Petitioner's conduct herein obviously offends someone. At least eight jurisdictions have had sufficient complaints from citizens to attempt to enact laws to prohibit such conduct. As the Oklahoma Court of Criminal Appeals stated in its opinion:

> In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture.

> In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

Even if, as Petitioner argues, the City is required to show a "compelling interest" to validate the ordinances in question, the City asserts that based upon this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the City has a compelling interest. In *Barnes*, this Court stated:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In Paris Adult Theatre I v Slaton, 413 US 49, 61, 37 L Ed 2d 446, 93 S Ct 2628 (1973), we said:
>
> > 'In deciding Roth [v United States, 354 US 476 [1 L Ed 2d 1498, 77 S Ct 1304] (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality." [Id.], at 485 [1 L Ed 2d 1498, 77 S Ct 1304].' (Emphasis omitted.)
>
> And in Bowers v. Hardwick, 478 US 186, 196, 92 L Ed 2d 140, 106 S Ct 2841 (1986), we said:
>
> > 'The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.'

> *Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.*

Id., 501 U.S. at 569. (Emphasis added.)

Petitioner suggests that any people who might overhear such a solicitation, if offended, could just avert their ears. Petitioner's argument ignores those people who receive the solicitation. The City asserts that Petitioner's suggestion that the recipients could just avert their ears is not consistent with either this Court's prior opinions or with the realities of such a public, unwanted offer. In *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 127-128, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), this Court stated:

> The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica. *In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid,* the dial-it medium requires the listener to take affirmative steps to receive the communication. *There is no "captive audience" problem here; callers will generally not be unwilling listeners.* The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst, on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising

> that it prevents an unwilling listener from avoiding exposure to it. (Emphasis added.)

And in *F.C.C. v. Pacifica Foundation*, this Court stated:

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

F.C.C. v. Pacifica Foundation, 438 U.S. at 748-9. (Footnote omitted.)

In *Frisby v. Schultz*, 487 U.S. 474, 497, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), this Court stated:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. See Consolidated Edison Co. v. Public Service Comm'n of New York, 447 US 530, 542, 65 L Ed 2d 319, 100 S Ct 2326 (1980). Cf. Bolger v. Youngs Drug Products Corp., supra, at 72, 77 L Ed 2d 469, 103 S Ct 2875. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

Even if, as Petitioner argues, the unwilling listener must turn his or her ears, the City would assert that the unwilling recipient of such a solicitation is just as captive as was the target of residential picketing in *Frisby*.

Lastly, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66-68, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), this Court stated:

> The idea of a "privacy" right and a place of public accommodation are in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.
>
> . . .
>
> Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by Stanley, or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. Cf. Roth v. United States, supra, at 483, 485-487, 1 L Ed 2d 1498; Beauharnais v. Illinois, 343 US, at 256-257, 96 L Ed 919. The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution. Cf. United States v. Reidel, supra, at 359-360, 28 L Ed 2d 813 (Harlan, J., concurring).

The Petitioner was not engaged in any public debate on the morality or legality of sodomy involving members

of the same sex on July 6, 1994. He was instead attempting to satisfy his own sexual desires by the solicitation of a criminal act. His words should not be protected by the First Amendment. But even if they were, the City's protection of the unwilling listener and the unwilling recipient override any claim of protection of the Petitioner's solicitation.

Proposition No. 2. The Federal Question of the Free Speech Clause of the First Amendment of the United States Constitution Was Not Pressed or Passed On In the Court of Criminal Appeals of the State of Oklahoma and Therefore, This Court Does Not Have Jurisdiction Over this Petition for Writ of Certiorari.

In the Opinion of the Court of Criminal Appeals issued November 21, 1995, Vice Presiding Judge Chapel outlined the thrust of this case:

> This case is neither about the regulation of conduct – between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons. Fundamentally, this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy.

(Pet. App., pp. 1a, 2a.)

On review of a Petition for a Writ of Certiorari, this Court has held that it will refuse to consider any federal question grounds if the question was not pressed or decided in the highest state court below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940). This Court stated:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. Blair v. Oesterlein Mach. Co., 275 US 220, 225, 72 L ed 249, 252, 48 S Ct 87; Duignan v. United States, 274 US 195, 200, 71 L ed 996, 1000, 47 S Ct 566. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.
>
> Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of *state* statutes not urged or considered there.

Id., 309 U.S. at 434. (Emphasis supplied.)

Therefore, for purposes of jurisdiction under 28 U.S.C. § 1257(a), a federal question must be timely presented by Petitioner or squarely addressed before the highest state court before the particular federal question will be reviewed by the Supreme Court.

Title 28 U.S.C. § 1257(a) provides:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision *could*

> *be had, may be reviewed* by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(Emphasis added.)

a. Overbreadth

The Petitioner's counsel twice stated in oral argument before the Municipal Court that Petitioner was not challenging this ordinance as being overbroad. The Petitioner did not raise this issue in his appeal to the Oklahoma Court of Criminal Appeals.

In fact, in the Opinion of the Court of Criminal Appeals, the Court noted the overbreadth waiver in its Opinion, n.1:

> However, this Court addresses only the fellatio portion of this definition, clearly an act of sodomy, because it is the only portion implicated by the facts of this case and because Sawatzky *failed to attack* the *ordinance as overbroad.*

(Pet. App., p. 2a, n.1.) (Emphasis supplied.)

b. Free Speech

Petitioner discusses *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), regarding the reversal of

a municipal court conviction for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft." Unlike this appeal, Defendant Cohen had pressed the federal constitutional question of whether the statute had violated his freedom of expression rights guaranteed by the First and Fourteenth Amendments to the United States Constitution throughout the trial proceedings and the appeals to the highest state court. This Court stated:

> The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co. v Bondurant*, 257 US 282, 66 LEd 239, 42 SCt 106 (1921).

Id., 403 U.S. at 17-18.

In contrast, in the case at bar, the Petitioner's counsel briefly mentioned the First Amendment's free speech argument orally in the Municipal Court, but not in his written briefs filed in the Municipal Court[2] or in the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals, in a footnote, in response to

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[2] As stated earlier, Petitioner's Motion to Dismiss mentioned free speech as an issue, but Petitioner failed to argue that point in his Brief in Support of that Motion.

Petitioner's abandoned equal protection claim, stated that the ordinance may implicate the First Amendment free speech right of Petitioner.

The City contends the First Amendment right to free speech was not presented by the Court of Criminal Appeals except tangentially. Therefore, the Supreme Court has no jurisdiction as a substantial federal question since it was not pressed by the final order of the highest criminal court of the State of Oklahoma, and the Petitioner had further not perfected the free speech federal question in his appeal from the criminal conviction after a trial to a jury. As Petitioner Sawatzky did not pursue his claim on infringement of free speech First Amendment rights, as well as the overbreadth issue beyond the trial level, and failed to urge the overbreadth issue at all, the City would assert there is no substantial federal question before the Supreme Court since both propositions in the Petition for a Writ of Certiorari argue claims based on free speech rights pursuant to the First Amendment. Therefore, this Court should decline to exercise jurisdiction over this case and deny the Petition for Writ of Certiorari for lack of a substantial federal question.

Proposition No. 3. Sections 30-151 and 30-152 of the Municipal Code of the City of Oklahoma City (1993) as Applied to Petitioner Are Not Overbroad.

Petitioner, at Proposition 1B argues that his conviction must be set aside as the ordinances at issue herein prohibit private, welcomed sexual advances. Of course, these are not the facts of the case at bar. The offer was

made in a public park to an obviously unwilling participant.

In *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) this Court stated:

> To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.

In *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1978), this Court stated:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall 694, 698-699, 19 L Ed 224 (1869); Supervisors v. Stanley, 105 US 305, 311-315, 26 L Ed 1044 (1882); Hatch v. Reardon, 204 US 152, 160-161, 51 L Ed 415, 27 S Ct 188 (1907); Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 US 217, 219-220, 57 L Ed 193, 33 S Ct 40 (1912); United States v. Wurzbach, supra, at 399, 74 L Ed 508; Carmichael v. Southern Coal & Coke Co., 301 US 495, 513, 81 L Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937); United States v. Raines, 362 US 17, 4 L Ed 2d 524, 80 S Ct 519 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 US 420, 429-430, 6 L Ed 2d 393, 81 S Ct 1101 (1961).

The Oklahoma Court of Criminal Appeals correctly held that in the facts of this case, Petitioner's public solicitation of sodomy could be punished. Further, the ordinance has now been changed to make clear that the prohibition of such offers are those made in public. Therefore, the City would assert that Petitioner cannot assert the rights of a third party who may be, but has not been, charged.

Proposition No. 4. This Court Cannot Issue Advisory Opinions to State Courts.

In Petitioner's second proposition, Petitioner appears to be requesting this Court either to order the Oklahoma Court of Criminal Appeals to decide whether the same-sex sodomy prohibition of 21 O.S. § 886 is constitutional under the Oklahoma Constitution (see Petition, p. 14, n.6), or to issue an advisory opinion to state courts who may be faced with the enforcement of a similar ordinance. (See Petition, p. 18.) Regarding the same-sex sodomy prohibition, this Court in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), decided that under the Fourteenth Amendment to the United States Constitution, homosexuals did not have a fundamental right to engage in consensual sodomy. The Oklahoma Court of Criminal Appeals held that it need not decide this issue under the Oklahoma Constitution under the facts of this case. Petitioner's First Amendment right, if any, is outweighed by protecting unwilling listeners and/or recipients of such solicitations. Petitioner's First Amendment arguments raised herein are a ruse to attempt to get this Court to order the Oklahoma Court of Criminal Appeals to decide the same-sex sodomy issue.

Regarding the Petitioner's request for an advisory opinion, this Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973):

> These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 US 37, 52, 27 L Ed 2d 669, 91 S Ct 746 (1971).

Petitioner's conviction in the case at bar is not at odds with the First Amendment. The other state cases cited by Petitioner are no longer at issue. This Court should deny the Petition for Writ of Certiorari.

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